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In the Supreme Court of the United States

October Term, 1986

OHIO DEPARTMENT OF MENTAL HEALTH,
Petitioner,

vs.

NANCY MILTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Whether the Court below erred in assuming that the constitutional limit on judicial evaluation of the "truth" of a religious belief demands that a state hospital patient's refusal of life-saving medical treatment, allegedly on grounds of religious belief, is entitled to free exercise protection even though her asserted belief has been diagnosed and found to be based on a psychotic delusion.

2. Whether, even if the patient's free exercise right is in issue, the state's interests in the preservation of life, in protecting medical judgment, and in caring for those within its custody are sufficiently compelling that it may require the patient to receive potentially life-saving medical treatment.

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vs.

NANCY MILTON,
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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner, Ohio Department of Mental Health, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on February 20, 1987.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 29 Ohio St. 3d 20, 505 N.E.2d 255 (1987) and appears at Appendix A. The opinion of the Ohio Court of Appeals, Tenth Appellate District, is unreported and appears at Appendix B. The unreported opinion of the Court of Common Pleas of Franklin County, Probate Division, appears at Appendix C. The unreported finding of the Probate Referee appears at Appendix D.

JURISDICTION

The judgment of the Ohio Supreme Court on the merits was entered on February 20, 1987. *See* Appendix E. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

The full text of Ohio Revised Code § 5122.271 is set forth in Appendix F.

STATEMENT OF THE CASE

1. Factual Background

Nancy Milton (respondent) is a patient at Central Ohio Psychiatric Hospital (COPH), a state owned and operated hospital for mentally ill people. For several years she has suffered from the fixed delusion that she is the wife of Reverend LeRoy Jenkins, a well-known evangelical faith-healer from central Ohio. 29 Ohio St. 3d at 21; Appendix A at A4. In her desire to live in proximity to Jenkins, respondent settled in Delaware County, Ohio, first residing with some religious persons and later living unsheltered in open fields. She was subsequently brought in November, 1984 to COPH where she has remained. Appendix G at A33. While at COPH, the respondent was diagnosed as suffering from a life-threatening form of uterine cancer. After consenting to some medical treatment, she eventually refused further medically indicated procedures purportedly on the grounds of religious belief. Appendix B at A16.

The respondent claimed she was married to LeRoy Jenkins and that, as a faith healer, he would cure her infirmities. Appendix B at A19. In fact, she was not married to Jenkins, was not being treated by Jenkins, and

Jenkins had disavowed any relation with Milton to the point that he even requested that COPH, the hospital at which Ms. Milton was undergoing care, prohibit her from continually calling him. Appendix B at A19. A psychiatric evaluation of the respondent was performed by Dr. Lewis Lindner, Chief Medical Officer at COPH, who concluded that, although she was of normal intelligence and was mentally able to understand other matters of day-to-day life, she was suffering a psychotic delusion with respect to her belief that Jenkins was her husband and would cure her by faith healing. This delusion, he concluded, prohibited her from understanding and dealing with her medical condition. Appendix A at A4.

2. Proceedings Below

This case began on January 10, 1986 when Dr. Lindner, pursuant to Ohio Rev. Code § 5122.271, Appendix F,[1] filed an "application to authorize surgery" in the Probate Division of the Franklin County (Ohio) Court of Common Pleas. The application alleged that Ms. Milton was suffering from a serious form of uterine cancer and was mentally unable to give a fully informed, intelligent, and knowing consent to life-saving medical treatment. Appendix C at A22. After counsel was appointed for the

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1. It is not a necessary prerequisite under Ohio Rev. Code § 5122.271 that a patient be diagnosed as mentally incompetent in all matters in order to be subject to court ordered surgery. Rather the lack of mental ability to execute judgment need only be shown with respect to the specific medical procedures sought. That is, all that need be shown is that the patient is mentally or physically unable to receive the information necessary to give a fully informed, intelligent, and knowing consent to the proposed medical treatment. Thus, while the Ohio Supreme Court in reaching its conclusion noted that the respondent had not been adjudged incompetent (the respondent had not, in fact, been subject to a competency hearing), the court also recognized that the lack of a finding of total incompetency was not dispositive. It therefore proceeded to the free exercise issue.

respondent, there was a hearing held on January 15, 1986 before a referee appointed by the Probate Court. On that day the referee authorized the medical procedure sought by Dr. Lindner. See Appendix D (Referee's Findings) and Appendix H (Entry Authorizing Surgery).

Objections to the referee's report were then filed by respondent's counsel and on February 12, 1986 the Probate Court held a hearing *de novo* on the application. At this time the Probate Court heard the testimony of Dr. Lindner and of Dr. Eugene Green, a psychiatrist who was not a full-time employee of the state, regarding the respondent's mental and physical condition. The respondent did not testify. The probate court judge, after hearing the testimony, concluded, in an opinion dated March 19, 1986, that Ms. Milton's beliefs were delusional and therefore did not implicate free exercise protections. Appendix C. Accordingly, the judge ordered that Ms. Milton could be directed to undergo life-saving treatment.

The matter was appealed to the Ohio Court of Appeals, Tenth Appellate District, which after expedited procedures, on July 18, 1986 rendered an opinion affirming the decision of the Probate Court. Appendix B. Respondent then appealed to the Ohio Supreme Court, which, in a divided opinion issued on February 20, 1987, overturned the lower court decisions and held that the first amendment prohibited the state from ordering the life-saving medical treatment. 29 Ohio St. 3d 20; Appendix A. Relying on *United States v. Ballard,* 322 U.S. 78 (1944) the court concluded that in evaluating the rationality of the respondent's mental state, the lower courts had impermissibly evaluated the truth or the correctness of the religious belief. 29 Ohio St. 3d at 24-26; Appendix A at A8-A11.

3. When and How the Federal Questions Were Raised and Decided Below

At the first hearing of this case, the hearing before the Probate Court referee on January 15, 1986, the respondent orally raised the claim that the first amendment prohibited the state from ordering her to undergo the proposed medical treatment.[2] Nevertheless, the referee ordered the treatment requested by COPH. See Appendix D. The first amendment claim has since been repeated and fully briefed at every stage of these proceedings. The Probate Court and the Ohio Court of Appeals both specifically denied the first amendment objection and held respondent could be forced to undergo medical treatment. Appendix C at A23 (rejecting first amendment argument); Appendix B at A20 (same).

The Ohio Supreme Court reversed the lower courts relying solely on the first amendment contention. The Ohio Supreme Court did mention the Ohio Constitution's guarantee of religious freedom, 29 Ohio St. 3d 20 at 23 n.7, 26 n.9, Appendix A at A7 n.7, A11 n.9, but it did not independently rely on that provision nor did it suggest that it was interpreting the state provision in any manner different from the federal. See *Michigan v. Long*, 463 U.S. 1032 (1983).

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2. As the Ohio Supreme Court noted, 29 Ohio St. 3d at 21 n.3, Appendix A at A3 n.3, no transcript of the hearing before the referee appears in the record.

REASONS FOR GRANTING THE WRIT

This case brings before the Court the threshold issue in free exercise analysis left open since *United States v. Ballard,* 322 U.S. 78—when may a court conclude that an assertion of religious belief is not entitled to constitutional protection because of the proponent's lack of the requisite mental state. In *Ballard,* this issue surfaced in terms of the proponent's sincerity; here the issue arises in relation to the proponent's mental capacity. In this case, as psychiatric testimony established, and the trial court found, the respondent's belief, which resulted in her refusing life-saving medical treatment, was based upon a psychotic disorder and not upon religious conviction. The Ohio Supreme Court, however, held that the conclusion that respondent's belief was a mental disorder was an evaluation of the "correctness" or propriety of the religious belief and was therefore impermissible. In so holding the Ohio court mandated virtually complete deference to any assertion of religious belief regardless of the mental state of its proponent. This holding is antithetical to the understanding of free exercise that underlies the decisions of this Court. Moreover, in the circumstances of this case, in which the "religious" objection is raised in opposition to the implementation of life-saving medical treatments, the holding is the equivalent of a writ of execution of a mentally ill person. It should be reversed.

This case also brings before the Court the issue of when the state may require a mentally-impaired person in its care to submit to life-saving procedures in derogation of that person's purported religious beliefs. The Ohio Supreme Court ruled that the patient's interests outweighed the state's interests. The ramifications of this

decision are significant. The Ohio court's decision occurs in a context where the state interest in rejecting the claim of religiousness is at its most sympathetic and the claim of religious belief is likely to be at its most questionable—cases in which the state seeks to treat mentally ill patients in order to save their lives. The decision thus seriously understates the strength of the state's interest in preserving the lives of those in its care and leaves the state virtually powerless to deal with those who threaten their own lives under the color of religious principle.

THE OHIO SUPREME COURT HAS ERRONEOUSLY DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. The Threshold Free Exercise Inquiry—Requisite Mental State

Free exercise of religion, like the exercise of any freedom, presupposes a minimal threshold of cognitive ability. An insane person who kills because he hears voices from God telling him to do so, is no more engaging in religious exercise than he is willfully committing murder. The Ohio Probate and Appellate courts then were surely correct in this case when they held that a belief that is based on a psychotic delusion is not entitled to constitutional protection under the free exercise clause. The Ohio Supreme Court, however, rejected this obvious result apparently on the grounds that rejecting a claim of free exercise protection for lack of requisite mental state was itself an invasion of religious liberty. The Ohio Supreme Court decision thus places in doubt whether a court may ever reject a claim of religious protection on the grounds of mental incompetency.

1. The lower courts have adopted inconsistent approaches to the question of when a belief alleged to be religious is entitled to First Amendment protection.

In one sense, the error of the Ohio Supreme Court is not unusual. Since the decision of this Court in *United States v. Ballard,* 322 U.S. 78 (1944), the appropriate standards for resolving the threshold free exercise inquiry—what mental state is required for an allegedly religious belief to receive first amendment protection?—have been anything but clear. Undoubtedly *Ballard* itself is a source of this confusion. *Ballard* involved a prosecution of the leaders of an ostensibly religious group for mail-fraud; specifically, the defendants in *Ballard* were charged with falsely claiming that they could cure diseases by faith healing. This Court held that in deciding the fraud issue, a jury could not inquire into the truth or falsity of the faith healing claims. Rather fraud could be determined only with respect to the sincerity of the defendants in asserting their claims—did the defendants actually believe their faith-healing representations? In short, though the content of the defendants' allegedly religious claims could not be adjudged false or fraudulent, the defendants' mental state in asserting those claims could appropriately be considered.

The underlying rationale of *Ballard* is not controversial. Many aspects of religion, after all, are non-rational and the content of such beliefs cannot be evaluated against rational standards. Moreover, as *Ballard* explained, if an individual could be denied religious protection simply on the grounds that others find the individual's professed beliefs to be "false", "little indeed would be left of religious freedom." *United States v. Ballard,* 322 U.S. at 87.

Ballard has proved to be elusive, however, because courts have had little guidance as to what may be considered in examining the bona fides of a religious claim. Indeed the most influential direction, and the one that appears to have contributed significantly to the confusion, is that advanced by Justice Jackson *dissenting* in the *Ballard* case itself. Justice Jackson argued that sincerity (or requisite mental state) could not be evaluated without reference to the truth or the credibility of the beliefs asserted as religious. Thus, for Jackson, determinations of the bona fides of mental state were as improper as determinations of the bona fides of specific content. *United States v. Ballard*, 322 U.S. at 92. (Jackson, J., dissenting.) Although his views were expressed in dissent, Jackson's position that review of mental state is the same as review of content has deterred a number of courts from meaningfully addressing the threshold issue. As one writer has criticized (in arguing that this abdication effectively minimizes free exercise protection), "the tendency of our courts and bureaucracies is to avoid issues of religious sincerity." Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. Rev. 299, 326.

The results of this issue-avoidance have been chaotic. Some courts, such as the Ohio Supreme Court below, have adopted a standard of almost complete deference to the allegation of religiousness advanced by the party seeking first amendment protection. Other courts, in cases where the religious claim appears on its face to be dubious, reject the allegation of religiousness out of hand.[3]

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3. *See, e.g., McCrory v. Rapides Regional Medical Center*, 635 F. Supp. 975, 979 (W.D. La. 1986); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd without opinion*, 589 F.2d 1113 (5th Cir. 1979); *United States v. Kuch*, 288 F. Supp. 439 (D. D.C. 1968).

Still others by-pass the threshold inquiry entirely, assuming that the belief or practice in question is religious and then resolving the matter against the "religious" claimant, nevertheless, by finding the existence of a "compelling" state interest that overrides the interest of the claimant.[4] Only a few courts have attempted meaningfully to investigate this threshold inquiry.[5] Clarification from this Court is needed to resolve these diverse standards of interpretation.

2. The Ohio Supreme Court's decision holding that a state hospital patient's assertion of a religious basis for refusing life-saving medical treatment precludes meaningful inquiry into the patient's mental capacity to assert such a claim has important consequences for the scope of free exercise rights, is erroneous, and should be reversed.

The threshold question presented here—i.e., when does a claim that a particular action has a religious basis implicate free exercise protection—arises either explicitly or implicitly in nearly every free exercise case.[6]

The lack of a consistent approach to this threshold issue has important consequences for the scope of free exercise rights. Too readily rejecting a free exercise

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4. *See, e.g., Nelson v. United States,* 796 F.2d 164 (6th Cir. 1986); *United States v. Rush,* 738 F.2d 497, 511-13 (1st Cir. 1984), *cert. denied,* 471 U.S. 1120 (1985); *Randall v. Wyrick,* 441 F. Supp. 312, 315-16 (W.D. Mo. 1977).

5. *See, e.g., Callahan v. Woods,* 658 F.2d 679 (9th Cir. 1981).

6. The issue is especially common in cases dealing with drugs, prisons, and taxes, but as this case shows is certainly not unique to those issues. *See also Mayock v. Martin,* 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied,* 393 U.S. 1111 (1969); *North Dakota v. Rivinius,* 328 N.W.2d 220 (N.D. 1982).

claim that seems bizarre to the majority may seriously undermine an important constitutional freedom. Too readily accepting a free exercise claim that lacks foundation may seriously undermine the state's ability to protect important interests.

The Ohio Supreme Court decision is one particularly egregious example of a court's failure to deal with the threshold free exercise issue. The facts in this case, found by clear and convincing evidence in the trial court, squarely established that the respondent's beliefs were products of mental disease, not religious belief. Appendix C at A23. Indeed, nowhere did the lower courts suggest that respondent's beliefs should be rejected because beliefs in either faith-healing or the Reverend Jenkins were false. Testimony at all times addressed only the mental condition of the respondent. Nonetheless, the Ohio Supreme Court, apparently concluding that inquiries into mental state and content could not be severed, held that the lower courts' conclusion that respondent's beliefs were a delusion was an impermissible rejection of the content of the respondent's religious belief. Rather, respondent's assertion of her belief as religious was held by the court to be entitled to almost complete deference.[7]

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7. The court's total reliance on the respondent's assertion of religious belief is indicated by its reference to the testimony of Dr. Green as showing that respondent's belief, "stands on its own without regard to any delusion." 29 Ohio St. 3d at 23 n.6; Appendix A at A7 n.6. 29 Ohio St. 3d 26; App. A at A11. The testimony of Green that is referred to for this proposition is his account of what the respondent told him about her "beliefs" in Jenkins and faith-healing; in effect, the portion of Green's testimony that the court refers to is respondent's own testimony offered through a third person. (The respondent herself did not testify.) Green's own testimony offered immediately after his account of the respondent's claim, was that in his opinion the claims of the respondent were delusions. Appendix G at A34-A35. There is no evidence in the record, other than Dr. Green's account of respondent's assertions, which suggest her beliefs are anything other than based on delusions.

The court's undue deference to an assertion of religious belief when cognitive capacity is at issue is error. Most fundamentally, the court's asserted basis for its decision—that inquiries into mental state constitute inquiries into religious content—is simply misguided. It is of course true that any attempt to differentiate between religious content and psychosis raises sensitive concerns. But it is not true that because many religious beliefs are non-rational, they can not be distinguished from the irrational fixations that may be caused by mental illness. Nor is it true that concluding that a person professing a particular belief does not possess the requisite mental state to implicate the free exercise clause is tantamount to a conclusion that the particular belief in question is sham or false. In this case, for example, holding that the respondent does not have the requisite mental ability meaningfully to refuse life-saving treatment does not deny the validity of a religious belief in either the Reverend Jenkins or in faith healing.

Moreover, the decision of the Ohio Court is inconsistent with the decisions of this Court, including those issued subsequent to *United States v. Ballard*, 322 U.S. 78 (1944). As this Court stated in *Wisconsin v. Yoder*, "although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which the society as a whole has important interests." 406 U.S. 205, 215 (1972). The first amendment, in short, does not require protecting "so-called religions . . . whose members are patently devoid of religious sincerity." *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir.), *cert. denied*, 434 U.S. 871 (1977). It similarly does not bar denying protection

to those whose ostensibly "religious" convictions are based in psychosis.

Finally, the practical ramifications of the Ohio court's decision are perverse. The decision places too high a regard on psychoses that happen to have some religious overtones. The inevitable conclusion suggested by the Ohio court is that the state would be allowed to administer life-saving treatment to respondent if her psychotic delusion were based on a secular belief that she was married to George Washington and he would save her but that the state is precluded from exercising its judgment in saving her life simply because she claims she is married to a faith healer. *See Mayock v. Martin,* 157 Conn. 56, 245 A.2d 574 (1968) (Shea, J., dissenting), *cert. denied,* 393 U.S. 1111 (1969). The first amendment can not require this result.

The Ohio Supreme Court opinion reflects an unfortunate trend that has become epidemic in free exercise cases—the failure of many courts adequately to address the threshold issue of the existence of a religious belief. This is a matter that sorely requires guidance from this Court. The simple truth is that avoiding an issue does not solve it. Indeed in cases such as the one present here, the failure properly to question the bona fides of an asserted religious belief may cost an individual her life.

B. The Ohio Supreme Court's Decision Holding That The State Interests In Seeking Medical Treatment For The Respondent Do Not Override Her Asserted Free Exercise Interest Is Erroneous And Should Be Reversed By This Court.

The right to free exercise of religion is not absolute, and may be limited when the state advances a "com-

pelling" interest. *See Hobbie v. Unemployment Appeals Com'n,* 107 S. Ct. 1046, 1049 (1987); *United States v. Lee,* 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of Indiana Employment Security Division,* 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972); and *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). In this case, even if respondent's free exercise right is implicated it must be balanced against a number of state interests. The respondent is in the care of medical and psychiatric professionals who have presented uncontroverted testimony that respondent will die if the request for authorization of life-saving treatment is not approved. As such, this matter fully implicates the state interests in preserving and protecting the sanctity of life, in protecting those entrusted to its care, and in protecting the professional integrity of those charged with providing medical care.

Whether the state may impose life-saving medical treatment of a mentally impaired individual in derogation of that person's religious beliefs has never been decided by this Court. It would initially seem, however, that if the state interests in preserving the integrity of the social security system, *United States v. Lee,* 455 U.S. 252 (1982), eradicating racial discrimination, *Bob Jones University v. United States,* 461 U.S. 574 (1983), protecting children from the hazards of door-to-door solicitation, *Prince v. Massachusetts,* 321 U.S. 158 (1944) and in prohibiting polygamy, *Reynolds v. United States,* 98 U.S. 145 (1879), are sufficiently weighty to override countervailing religious interests, the state interests in this case, which include preserving life, should prevail *a fortiori. See John F. Kennedy Memorial Hosp. v. Heston,* 58 N.J. 576, 584, 279 A.2d 670, 674 (1971). *See also Jacobson v. Massachusetts,* 197 U.S. 11 (1905), (holding that the state interest in preserving health would prevail over a liberty interest

expressed by a Jehovah's Witness who objected to compulsory vaccination on religious grounds).

This issue has, however, received mixed treatment in the lower courts.[8] There is general judicial consensus that the state will prevail in its role of parens patriae in cases involving minor children. *See, e.g., People v. Labrenz,* 411 Ill. 618, 104 N.E.2d 769 (1952); *State v. Perricone,* 37 N.J. 463, 181 A.2d 751, *cert. denied,* 371 U.S. 890 (1962); *Raleigh Fitkin-Paul Memorial Hosp. v. Anderson,* 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964). On the other hand, the trend is that the individual will prevail in cases involving competent adults. *See, e.g., Bouvia v. Superior Court,* 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); *In re Brooks,* 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *In re Osborn,* 294 A.2d 372 (D.C. 1972); *but see John F. Kennedy Memorial Hosp. v. Heston,* 58 N.J. 576, 584, 279 A.2d 670, 674 (1971).

The cases that have created the greatest conflict are those, such as the one present here, in which the mental capacity of the adult is impaired. Some courts hold that a prevailing state interest exists because of the person's questionable mental abilities, while others permit the individuals to refuse treatment because they have not been adjudged incompetent. *Compare Application of the President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (D.C. Cir.), *cert. denied,* 377 U.S. 978 (1964); *State Dep't of Human Services v. Northern,* 563 S.W.2d 197 (Tenn. Ct. App.), *cert. denied,* 436 U.S. 923 (1978); *Mayock v. Martin,* 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied,* 393 U.S. 1111 (1969) *with Winters v. Miller,* 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971).

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8. The issue in the lower courts is often litigated with the patient's interest characterized as a right of privacy.

The importance of this issue and the uncertainty and agony it has caused in the lower courts cannot be overestimated.[9] The issue moreover is likely to become even more prevalent. As one text states: "The recently evolving notion that an institutionalized mentally disabled person has a right to refuse treatment is perhaps the most divisive issue confronting the mental health field in the 1980s. . . . For the health care provider the medical best interests standard guides his decisions, with the goal being to maximize life and promote health. The attorney, on the other hand, is responsible for advocating what his competent client desires . . . . This obligation is complicated by the fact that in some cases the line between competency and incompetency is an unclear one with the client appearing competent to decide some issues but not others." S. Brakel, J. Parry and B. Weiner, *The Mentally Disabled and the Law* 341 (3d ed. 1985) (footnotes omitted). Because of the importance of this issue and the magnitude of the stakes involved the matter should be reviewed by this Court.

The weight of the state interests can be no greater than that present here and this Court should reverse the decision of the Ohio Supreme Court. First the state interest is in preserving life, but, to reemphasize, the case does not rest solely upon an abstract balance between the state's interest in the preservation of life and the right of religious exercise. In this case, because the person for whom the life-saving treatment is sought is mentally impaired and in the care and custody of the

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9. The accounts of the personal turmoil of Judge Skelly Wright in *Georgetown College* and of Judge Markowitz in *Powell v. Columbia Presbyterian Medical Center*, 49 Misc. 215, 267 N.Y.S.2d 450 (Sup. Ct. 1965) are well documented. *See, e.g.*, Paris, *Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail*, 10 U.S.F. L.R. 1 (1975).

state and its physicians, the weight of the state interest is increased both because of its role of parens patriae to those in its care and because of the interests of the physicians in complying with their medical obligations. *See Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971).

Ample facts support the contention that respondent is in need of both the state and her attending physicians' aid and protection. This is first demonstrated in reference to respondent's physical condition. This is not a case in which an individual wants to die—she wants to be cured and the evidence suggests that her cancer may be abated if properly treated. 29 Ohio St. 3d at 21 n.2; Appendix A at A3 n.2. Medical treatment will thus further the respondent's own desires. *See Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). The need for care is also established by reference to respondent's mental state. Respondent claims to be the wife of a faith healer—in fact she is not. 29 Ohio St. 3d at 21; Appendix A at A4. She is diagnosed as having a psychosis. Appendix G at A33. She is in the care of a state psychiatric hospital and prior to the time of her residing there had lived unsheltered in an open field. Appendix B at A16. A psychiatrist who examined her stated that she suffers from delusions and has an "actual denial of reality." *Transcript of Hearing Before the Probate Court* at 10. Furthermore, although she can function on a day-to-day basis, "part of her mind function is blocked out by this delusional system." *Id.* at 26. In such circumstances, deference to those charged with acting in her in-

terest is clearly appropriate. *Cf. Youngberg v. Romeo,* 457 U.S. 307 (1982).

No case demands more careful scrutiny than a case in which a life hangs in the balance. Before a court allows a person to embark on a course that will result in that person's death there should be clear evidence that the individual is mentally able to make the decision. Because the basis of respondent's decision to refuse medical treatment is at best ambiguous, the weight of her asserted interest is diminished. For the same reason, the state interest in protecting her is so much the greater. Furthermore, because the effect of respondent's decision is irrevocable, while the effect of the state decision is not, sound jurisprudence demands that any doubt be resolved in favor of the state. Any decision resulting in the death of the respondent cannot be reexamined. This Court should reverse the Ohio Supreme Court, and clearly establish that the state's compelling interests in preserving life, in protecting professional medical judgment, and in caring for those in its custody outweighs the free exercise claim presented here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio

(Decided February 20, 1987)

No. 86-1218

THE SUPREME COURT OF OHIO

In Re Milton

[29 Ohio St. 3d 20]

1. The First Amendment to the United States Constitution and Section 7, Article I of the Ohio Constitution safeguard an individual's freedom to both choose and employ religious beliefs and practices.

2. The state may not compel a legally competent adult to submit to medical treatment which would violate that individual's religious beliefs even though the treatment is arguably life-extending.

APPEAL from the Court of Appeals for Franklin County.

This case arises from an application filed with the Court of Common Pleas of Franklin County, Probate Division, requesting authorization to perform medical treatment on appellant, Nancy Milton. The application which

was filed pursuant to R.C. 5122.271[1] by Dr. Lewis A. Lindner, the Chief Medical Officer of the Central Ohio Psychiatric Hospital (hereinafter "hospital"), alleged that

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1. R.C. 5122.271, which is applicable to mental hospital patients, provides as follows:

"(A) Except as provided in divisions (C), (D), (E), and (F) of this section, the chief medical officer or, in a nonpublic hospital, the attending physician responsible for a patient's care shall provide all information, including expected physical and medical consequences, necessary to enable any patient of a hospital for the mentally ill to give a fully informed, intelligent, and knowing consent, the opportunity to consult with independent specialists and counsel, and the right to refuse consent for any of the following:

"(1) Surgery;

"(2) Convulsive therapy;

"(3) Major aversive interventions;

"(4) Sterilization;

"(5) Any unusually hazardous treatment procedures;

"(6) Psycho-surgery.

"(B) No patient shall be subjected to any of the procedures listed in divisions (A)(4) to (6) of this section until both his informed, intelligent, and knowing consent and the approval of the court have been obtained, except that court approval is not required for a legally competent and voluntary patient in a nonpublic hospital.

"(C) * * *

"If a patient is physically or mentally unable to receive the information required for surgery under division (A)(1) of this section and has no guardian, then the information, the recommendation of the chief medical officer, and the concurring judgment of a licensed physician who is not a full-time employee of the state may be provided to the court in the county in which the hospital is located, which may approve the surgery. Before approving the surgery, the court shall notify the legal rights service that is created by section 5123.60 of the Revised Code, and shall notify the patient of his rights to consult with counsel, to have counsel appointed by the court if he is indigent, and to contest the recommendation of the chief medical officer.

"* * *

"(G)(1) Unless there is substantial risk of physical harm to himself or others, or other than under division (D) or (E) of this section, this chapter does not authorize any form of compulsory medical, psychological, or psychiatric treatment of any patient who is being treated by spiritual means through prayer alone in accordance with a recognized religious method of healing without specific court authorization."

appellant was unable to give informed, intelligent, and knowing consent for surgery. Dr. Lindner petitioned for an order requiring appellant to submit to radiation treatments, transfusions and possible surgery, stating that without these treatments, the patient would suffer an early death.[2]

A hearing on the application was conducted in the probate court.[3] The hospital called two witnesses at this hearing, Dr. Lewis Lindner and Dr. Eugene Green, a psychiatrist. Dr. Green testified that appellant was alert, responsive, did not appear confused, and could function in many areas of everyday life. Dr. Lindner stated that she was of normal intelligence.

Appellant, a fifty-three-year-old patient of the hospital, refused to consent to this medical treatment primarily because it conflicted with her belief in faith healing.[4] Dr.

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2. Dr. Lindner testified that appellant had cancer of the uterus which was in "a relatively advanced stage," and that there was a possibility she might be cured by medical treatment. Nevertheless, he estimated that even if she did receive the prescribed medical treatment, there was less than a fifty percent chance that she would be free of cancer for five years or more. At a minimum, he believed the treatment would arrest the tumor and considerably prolong appellant's life. Dr. Lindner further testified that appellant's death from the cancer was almost inevitable if she did not receive this medical treatment.

3. The first hearing on Dr. Lindner's application was before a probate court referee who recommended that the hospital be permitted to perform the requested treatment without appellant's consent. No transcript of that hearing appears in the record. Appellant filed objections to this recommendation, and the probate court heard the matter *de novo*.

4. Dr. Green testified that appellant had stated that her primary reason for refusing medical treatment was her belief in spiritual healing, but she also indicated to him that a secondary reason for her refusal was that she had a background in nursing and desired to avoid the adverse side effects which she knew to be attendant to radiation treatments. He concluded, "I had the feeling again and again that in her hierarchy of beliefs, number one was [the] omnipotence of faith healing. This was her business. * * * This was God's business and we shouldn't tamper with it. We should believe and be healed."

Lindner claimed that appellant's stated reasons for refusing consent constituted a psychotic delusion and that she was unable to understand and appreciate the information necessary to either provide informed consent or to refuse such consent. Dr. Lindner asserted that appellant's entire belief system was delusional because she had a fixed long-standing delusion that she was the spouse of Rev. LeRoy Jenkins, a faith healer and evangelist who is well known in the central Ohio area.

Dr. Lindner conceded that appellant has never been adjudicated incompetent and that the hospital had accepted, without question as to her competency, her informed consent for all prior treatments at the hospital, including the biopsy through which the malignant tumor was diagnosed.

The trial court found that appellant had the mental capability to understand the nature of her illness and the contemplated treatment, but held that since appellant was not receiving spiritual treatment from Rev. Jenkins, the court could intervene. Therefore, the trial court authorized the requested medical treatment. The court of appeals affirmed, holding that appellant's beliefs in faith healing "* * * by all rational evaluation, constitute a delusion."

This cause is now before this court pursuant to the allowance of a motion to certify the record.

ANTHONY J. CELEBREZZE, JR., *attorney general*, and J. MICHAEL EVANS, for appellee Department of Mental Health.

RONALD L. SMITH, for appellant.

G. MICHAEL KIRKMAN and BRUCE A. CAMPBELL, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc.

WRIGHT, *J.* This is a case of first impression in Ohio. Several difficult and delicate questions are before us, including whether a state acting through its courts may compel an individual to submit to medical treatment which is arguably life-extending in derogation of that individual's religious beliefs. We must also decide whether the court below infringed upon appellant's constitutional right of religious freedom in citing the essence of her belief in faith healing as evidence of her lack of capacity to provide informed consent to medical treatment. We believe these questions should be resolved in favor of appellant and, thus, we reverse the holding of the appellate court.

At the outset, we emphasize that at no time has any court found appellant to be incompetent under state law. Appellant is a voluntary patient of the hospital. However, even if she were to be involuntarily committed, that commitment would not be tantamount to a finding of incompetency. Commitments to a mental institution and adjudications of incompetency are distinct legal proceedings which determine separate issues and often lead to different results. Commitment proceedings focus on proof of dangerousness as the primary determinant of the need for commitment, while incompetency adjudications evaluate a person's cognitive ability to make decisions.[5] "[A] finding of 'mental illness' * * * and commitment to a hospital, does [*sic*] not raise even a presumption that the patient is 'incompetent' or unable adequately to manage his own

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5. Incompetency adjudications measure a person's cognitive ability to make a lawful decision regardless of its economic effect on others. In contrast, the major justification for involuntary commitment is protection of society or of the incapacitated individual. See Brakel, Parry & Weiner, The Mentally Disabled and the Law (3 Ed. 1985) 374. R.C. 2111.01 defines an incompetent as "any person who by reason of advanced age, improvidence, or mental or physical disability * * * or mental illness, is incapable of taking proper care of himself or his property * * *."

affairs." *Winters v. Miller* (C.A. 2, 1971), 446 F. 2d 65, 68. Thus, a person who is not in a mental institution may be found to be incompetent, and a person properly committed to a mental institution may be legally competent.

Persons admitted to mental hospitals retain all civil rights not specifically denied by statutes or removed by separate adjudications of incompetency. R.C. 5122.301. These civil rights include the right to sue or defend in one's own name, sell or dispose of property, marry, draft a will, freely practice one's religion, and refuse medical treatment for religious reasons. See *Winters v. Miller, supra.* In *Winters* a case factually similar to our own, a Christian Scientist, who was committed to a mental hospital, but who had not been adjudicated incompetent, refused to consent to medical treatment on the basis of her religious beliefs. The court discussed the requirement that only a "['] grave and immediate danger to interests which the state may lawfully protect [']" (*id.* at 69) can justify a state's interference with the freedom of religion and held that "there is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party." *Id.* at 70. Thus, it is apparent that the state may not act in a *parens patriae* relationship to a mental hospital patient unless the patient has been adjudicated incompetent.

The fact that appellant has a long-standing delusion that she is Rev. Jenkins' wife and that he will perchance heal her infirmities simply does not strip appellant of her constitutional rights to freely select and adhere to the religion of her choice. The testimony of Dr. Green, the hospital's own witness, supports a conclusion that appellant's belief in spiritual healing stands on its own, without

regard to her delusion.[6] Dr. Green explained that appellant's psychosis was "pretty much limited to delusional imaginations" and that "[c]ertain other parts of her seem pretty much intact."

The First Amendment to the United States Constitution and Section 7, Article I of the Ohio Constitution safeguard an individual's freedom to both choose and employ religious beliefs and practices.[7] See *Bd. of Edn. of Cincinnati v. Minor* (1872), 23 Ohio St. 211, 250. A person's religious beliefs are protected absolutely. *Cantwell v. Connecticut* (1940), 310 U.S. 296, 303. The state may not interfere with the expression of belief, nor may it "compel behavior offensive to religious principles." (Emphasis

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6. Dr. Green testified that appellant could receive the information necessary to consent or not consent to the medical treatment in an intelligent and informed capacity. He noted that she is aware that she has a malignant tumor, but she believes that she will be cured through faith healing. She also made it very clear to Dr. Green that she was a faith healer and did not believe in other methods of treatment. Her belief in spiritual healing is long-standing. She informed Dr. Green that Rev. Jenkins had cured her blindness (which was thought to be hysterical blindness) in the past. Dr. Green explained that he felt spiritual healing is the prime thing in appellant's life and she believes that it would be almost a sin to try anything else.

7. Section 7, Article I of the Ohio Constitution provides:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted."

The First Amendment to the United States Constitution provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The Free Exercise Clause of the First Amendment applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut* (1940), 310 U.S. 296, 303-304. See, also, *School Dist. of Abington Twp. v. Schempp* (1963), 374 U.S. 203.

deleted.) *School Dist. of Abington Twp. v. Schempp* (1963), 374 U.S. 203, 250 (Brennan, *J.*, concurring).

While religiously inspired *acts* do not receive absolute protection, "* * * [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins* (1945), 323 U.S. 516, 530; *Sherbert v. Verner* (1963), 374 U.S. 398, 406; see, also, *Wisconsin v. Yoder* (1972), 406 U.S. 205, 215. Freedom of religion may be infringed "only to prevent grave and immediate danger to interests which the State may lawfully protect." *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 639.

Appellee does not suggest any state interest sufficient to justify interfering with appellant's religiously inspired refusal to consent to medical treatment. Appellee argues that appellant's delusion that she was Rev. Jenkins' spouse negated her religious views and made her entire belief in faith healing a delusion. The court of appeals looked to the content of appellant's religious beliefs and found that her belief in faith healing constituted a delusion. We do not accept this contention.

There is a dichotomy between modern medicine which is scientific and based upon provable theories and religion which is *inherently* mystical, intangible and a matter of individual faith. Yet, the Ohio and United States Constitutions mandate that when the dictates of modern medicine and religious beliefs collide, the conflict be resolved by leaving the medical treatment decision to the individual. As the court stated in *United States v. Ballard* (1944), 322 U.S. 78, 86, freedom of religion "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. * * * Men may believe what they cannot prove. They

may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

While there may be a variety of opinions as to the efficacy of spiritual healing through faith, the courts below acknowledged that it is a form of religious belief and practice. We recognize that extending constitutional protection to a belief in spiritual healing and other religiously motivated refusals to accept medical treatment can be very troubling to those who do not share these beliefs, since, in cases such as this one, the patient may die as a result of refusing the recommended treatment. "* * * But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in * * * religion * * * or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Edn. v. Barnette, supra,* at 642.

Other jurisdictions have also recognized that an individual's decision to forego traditional medical care and rely on faith healing is encompassed within the freedom of religion. For example, in *In re Estate of Brooks* (1965), 32 Ill. 2d 361, 373, 205 N.E. 2d 435, 442, the Illinois Supreme Court held that compulsory medical treatment, which was in violation of the patient's religious beliefs, no matter how well intentioned, violated the First Amendment's Free Exercise Clause, absent a showing of a substantial state interest. The court reasoned: "Even though we may consider appellant's beliefs unwise, foolish, or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith * * * for the sole pur-

pose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences. In the final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views based upon religious convictions. Such actions cannot be constitutionally countenanced." *Id.*

Similarly, in *In re Osborne* (D.C. App. 1972), 294 A. 2d 372, a Jehovah's Witness refused to consent for religious reasons to the administration of blood transfusions. The court found that the patient had validly and knowingly chosen this course for his life and there was no compelling state interest which justified overriding that decision. See, also, *Holmes v. Silver Cross Hospital* (N.D. Ill. 1972), 340 F. Supp. 125; *In re Melideo* (1976), 88 Misc. 2d 974, 390 N.Y. Supp. 2d 523. Cf. *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson* (1964), 42 N.J. 421, 201 A. 2d 537.

Appellee also suggests that appellant's beliefs are not entitled to protection because she is not a member of any specific religious denomination or sect and is not being treated in accordance with a recognized method of healing. The trial court noted that if appellant were receiving spiritual treatment from Jenkins the court would have been precluded from ordering the medical treatment. However, since she was not actively receiving such spiritual treatment, the court reasoned that it was under no compulsion to recognize appellant's wishes in this matter. Such a distinction is patently in conflict with appellant's constitutional rights. Religious freedom is one of " 'absolute equality before the law, of all religious opinions and sects * * *. The government is neutral, and, while protecting all, it prefers none, and it disparages none.' " (Emphasis deleted.) *School Dist. of Abington Twp. v. Schempp,*

supra, at 215. "In such an intensely personal area, * * * the claim of the * * * [believer] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger* (1965), 380 U.S. 163, 184.

Appellant has expressed a long-standing belief in spiritual healing, and great weight must be given to her statement of her personal beliefs. We cannot evaluate the "correctness" or propriety of appellant's belief. Absent the most exigent circumstances, courts should never be a party to branding a citizen's religious views as baseless on the grounds that they are non-traditional, unorthodox or at war with what the state or others perceive as reality.

The testimony of Dr. Green supports our conclusion that appellant's belief in spiritual healing stands on its own, without regard to any delusion.[8] We can probe no further. Appellant's religious freedom to believe and act according to the dictates of her belief in spiritual healing prevents a court from ordering treatment against her will that would violate her religious beliefs. Thus, we hold that the state may not compel a legally competent adult to submit to medical treatment which would violate that individual's religious beliefs even though the treatment is arguably life-extending. Therefore, the probate court's determination was erroneous and the judgment of the court of appeals upholding it is reversed.[9]

Judgment reversed.

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8. See footnote 6, *supra*.

9. We emphasize that this case involves a religiously motivated choice by an adult. It does not present, and therefore we do not address, the issue of a parent who seeks to deny medical treatment for a child on religious grounds. See, *e.g.*, *Jehovah's Witnesses in the State of Washington v. King Cty. Hosp. Unit No. 1* (W.D. Wash. 1967), 278 F. Supp. 488, affirmed (1968), 390 U.S. 598, rehearing denied (1968), 391 U.S. 961.

(Continued on following page)

MOYER, C.J., SWEENEY, DOUGLAS and H. BROWN, JJ., concur.

LOCHER and HOLMES, JJ., dissent.

HOLMES, J., dissenting. While I am in complete agreement with the syllabus law and the discussion of such law as contained in the majority opinion, I must dissent therefrom in that I feel the majority has completely misconstrued the facts of this matter and the holding of the lower courts in applying such syllabus law.

I am in agreement that the state may not compel the medical treatment of a person who is capable of making the determination of granting or denying the consent for a surgical activity where such determination is based upon a religious belief, even though such belief is strange or incomprehensible to others. However, where the facts show than an individual is so confused in the thinking process that such belief is not rationally formulated and is an outworking of a psychosis, as held by the trial court and the court of appeal here, then the question is not one of a religious infringement but is instead one of the degree of mental instability.

Both of the testifying psychiatrists agreed that her refusal of medical treatment sprang from her belief that she was the wife of LeRoy Jenkins. While her thinking re-

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Footnote continued—

Appellant also questions the probate court's expansion of the term "surgery" in R.C. 5122.271 to include "radiation treatments." R.C. 5122.271(C) provides that the probate court may approve of surgery for mental hospital patients in the absence of their consent. Appellee contends, and the probate court found, that this term "surgery" encompassed radiation treatments. However, because appellant's belief in faith healing entitled her to protection under the United States and Ohio Constitutions, she cannot be compelled to undergo any medical treatment and, thus, we need not address this issue.

mained undisturbed in other areas, this fixed delusion had already placed her in one life-threatening situation, *i.e.*, police had discovered her living unsheltered in the open fields. It is the very nature of a psychosis that an ordinary part of the personality becomes the medium of expression for the illness. When a belief becomes fixed as part of such illness, then the patient becomes incapable of rationally assessing danger relative to the fixation. This would be true whether the belief occurred as the more typical paranoid delusion manifesting itself in intense fear and/or violence or, as here, in a delusion based upon ordinarily held religious beliefs. Just as the illness has nothing to do with appellant's beliefs, so also the diagnosis of illness is not a value judgment of her beliefs.

Here the probate court and trial court reasonably found that Nancy Milton was unable because of her confused mental condition to give an informed, intelligent and knowing consent for her surgery. Such a finding should be appealed to this court without the esoteric, constitutional free-exercise-of-religion discussion. Appellant has expressed quite enough to demonstrate to the lower courts, and certainly to this court, that she is *incapable* of making her own medical determination. She has asserted that she is married to LeRoy Jenkins, and that this member of the T.V. and now radio clergy would heal her maladies. However, Jenkins has, by way of press announcement in The Columbus Dispatch, publicly removed himself from this appellant and stated that she needs help from others.

It is my view that Nancy Milton does need help from others, and that the probate court and the court of appeals properly recognized that such help should be forthcoming from the medical profession as appropriately prescribed. Accordingly, I would affirm the probate court and the court of appeals.

LOCHER, *J.*, concurs in the foregoing dissenting opinion.

LOCHER, *J.*, dissenting. I agree with the dissent of Justice Holmes and wish to add a few observations of my own.

Nancy Milton was mentally incapable of receiving information concerning her condition and of consenting to surgery. Dr. Lewis A. Lindner testified at the hearing that the patient had totally denied having a tumor to begin with, and that later she refused to accept that she had it—in spite of her being able to feel it growing in her pelvic area. Dr. Lindner added that her stated reason for refusal was that she was the wife of Rev. LeRoy Jenkins, and that she believed he "would come to the hospital and take her away and heal her supernaturally." It is evident that these psychotic delusions have created an impenetrable "wall" which prevents her from admitting she has the tumor and from consenting to the surgery. For her to consent to surgery would be to deny her belief that LeRoy Jenkins would come and take her away to be healed. Nancy Milton is incapable of surmounting this mental wall created by her own delusions. In conclusion, I am convinced that her refusal to consent to surgery is the result of her delusions concerning LeRoy Jenkins rather than her belief in faith healing.

Accordingly, I dissent.

APPENDIX B

Opinion of the Court of Appeals

(Rendered on July 18, 1986)

No. 86AP-630

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of:

NANCY MILTON (Alleged Mentally Ill),
(NANCY MILTON,
Appellant).

OHIO LEGAL RIGHTS SERVICE, MR. RONALD L. SMITH and MR. THOMAS R. WETTERER, JR., for appellant Nancy Milton.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, and MR. J. MICHAEL EVANS, for appellee Ohio Department of Mental Health.

APPEAL from the Franklin County Court of Common Pleas, Probate Division.

OPINION

TYACK, J.

Appellant, Nancy Milton, is a patient at Central Ohio Psychiatric Hospital. She has suffered for several years from a fixed delusion that she is the wife of Evangelist Leroy Jenkins. She pursued this delusion for awhile by following Evangelist Jenkins around the country. Then she settled in Delaware County, Ohio, so she could be

near Evangelist Jenkins. At first she resided with religious persons in the area. Later she moved into the open fields of the county, which brought her to the attention of the local authorities. She subsequently was brought to Central Ohio Psychiatric Hospital where she has resided for some years.

In December of 1985, a biopsy was performed with her consent. The results indicated that she had (and has) a malignant tumor in the cervical area of her uterus. In January of 1986, medical authorities at the Central Ohio Psychiatric Hospital applied to the Probate Division of the Court of Common Pleas for Franklin County, Ohio, to authorize treatment of the uterine cancer.

A hearing was held upon the "application to authorize surgery" before a referee of the probate division, who recommended that the requested medical treatment be authorized. An objection was filed to the referee's report by the Ohio Legal Rights Service on behalf of appellant, Nancy Milton.

On February 12, 1986, a hearing was conducted before Franklin County Probate Judge Richard Metcalf, at which time testimony was received from two psychiatrists at Central Ohio Psychiatric Hospital indicating that medical treatment for the cancer was necessary immediately. The doctors both indicated that appellant, Ms. Milton was refusing treatment because she was firmly convinced that Evangelist Jenkins was going to arrive at any moment, take her from the hospital, and heal her of her cancer. Both doctors referred to this as a fixed delusion.

The probate court allowed time for filing of briefs as to the issues raised by the fact situation and, on March 19, 1986, filed an opinion authorizing the requested medical treatment. For reasons that are not apparent, this opinion

was not formally journalized until June 2, 1986. The opinion and entry provided that the day of surgery should be postponed "until time has expired for appeal from this judgment."

On July 1, 1986, Ohio Legal Rights Service filed a notice of appeal "from the order of involuntary medical treatment entered * * * on the 2nd day of June, 1986." The Office of the Attorney General of Ohio filed a motion to expedite the appeal because of the urgent need to perform the medical procedures authorized by the Franklin County Probate Court in order to preserve the life of appellant, Nancy Milton.

This court sustained the motion and directed the expedited filing of briefs and oral argument.

Appellant raises two Assignments of Error for consideration.

Assignment of Error No. 1

"The court below erred in finding that appellant was mentally unable to receive the information required to make a medical treatment decision.

"Assignment of Error No. 2

"The court below erred in expanding the statutory terms 'surgery' to include 'Radiation Treatments' and in authorizing the performance of such treatments."

Appellant subdivided the first assignment of error into two parts.

"A. The evidence presented to the court below was insufficient to establish by a standard of clear and convincing evidence that appellant was unable to receive the information required to make a medical treatment decision.

"B. The court below improperly infringed upon appellant's religious freedom by basing its decision upon appellant's religious briefs. [sic]"

Both assignments of error ask us to interpret R.C. 5122.271. The thrust of the statute is to require medical personnel to fully inform patients of a hospital for the mentally ill as to the consequences of and to give the patients the right to refuse consent for any of a number of procedures, expressly including surgery and any unusually hazardous treatment procedures. The consent required must be informed, intelligent and knowing.

The statute allows this consent to be by-passed "if a patient is physically or mentally unable to receive the information required for surgery" and a number of procedural safeguards are followed. If the phrase "unable to receive" is construed literally, the only time consent could be avoided would be when the patient is unconscious, in a coma, or otherwise unable to receive sensory stimuli. A more rational reading of the statute is to interpret *receive* to mean see or hear; understand to a point; meaningfully evaluate; and express that evaluation to at least some degree. In other words, consent is required of those who are capable of giving some semblance of an informed, intelligent and knowing consent.

Applying this construction to the case below, the trial court did not abuse its discretion in finding by clear and convincing evidence that appellant, Nancy Milton, was incapable of receiving the information required for surgery. Appellant, Nancy Milton, is incapable of receiving the suggestion that she could die from her cancer if no action is taken. Having at first denied that she harbored a cancerous growth, she now is forced to admit its existence by the fact that she can feel the growing lump in her

lower abdomen. Still her inability to face her situation continues and is bound up with her delusion that she is married to an evangelist and faith healer who will momentarily arrive to save her. The faith healer in question denies all ties to her and has requested that her telephone privileges at the Central Ohio Psychiatric Hospital be suspended because she is making a nuisance of herself with her repeated telephone calls to him.

This leads to the second portion of appellant's first assignment of error. Certainly the sanctity of one's religious beliefs are to be honored and freedom of religion given the widest possible latitude. This is the mandate of both our federal and state constitutions.

The First Amendment to the Constitution of the United States states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 7, Article I of the Ohio Constitution states:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted."

Any court must be very slow to disregard a person's honestly held religious beliefs, lest mistakes such as the

Salem witchcraft trials and the Spanish Inquisition be repeated in more modern and sophisticated form. Yet the situation here reaches the level that the beliefs of the individual, by all rational evaluation, constitute a delusion. A pure delusion, even though it involves the concept of God, should not be the basis for thwarting the statutory scheme which does make allowances for alternatives where an individual is pursuing a pattern of treatment in accordance with honestly held religious beliefs.

The ruling of the court below is not clearly erroneous in determining that the order for surgery is legally permissible.

The second assignment of error again urges a restrictive reading of the statute. While a narrow construction in some aspects is advisable, such a narrow reading could lead to the conclusion that no informed consent is necessary for a patient to experience treatment other than the precisely enumerated acts. In other words, informed consent is necessary for: (1) surgery; (2) convulsive therapy; (3) major aversive interventions; (4) sterilization; (5) unusually hazardous treatment procedures; and (6) psychosurgery; but nothing else. Under this reading, the assignment of error would be overruled because the radiation therapy does not clearly fit under any of the listed categories.

A more realistic reading of the statute is that informed consent is required for surgery and the medically necessary steps preceding and incident to it—in this case including radiation treatments.

The assignment of error does not present the issue of chemotherapy and treatment by such means subsequent to the ordered surgery, so the court does not reach out to address that issue.

The court is not unmindful of the possibility that in this particular case the efforts to save appellant Nancy Milton's body may destroy the person. Hopefully, in time, she will come to believe that God can send doctors, as well as Leroy Jenkins; and sometimes God even sends courts of appeals.

Both assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas, Probate Division is affirmed.

Judgment affirmed.

REILLY and HADLEY, *JJ.*, concur.

HADLEY, *J.*, of the Logan County Common Pleas Court, sitting by assignment in the Tenth Appellate District.

APPENDIX C

Opinion of the Probate Court of Franklin County

(Filed March 19, 1986)

Case No. M-5303

IN THE
PROBATE COURT OF FRANKLIN COUNTY, OHIO

In the Matter of
NANCY MILTON

OPINION

This matter comes before the Court on the Application of The Central Ohio Psychiatric Hospital and its medical director, Dr. Louis Lindner, for authorization to perform medical treatments on respondent against her will. Asserting that such treatments are necessary to save the life of respondent, and claims that the respondent is unable to receive the information necessary to give her informed consent to such medical procedures. The medical procedures contemplated include transfusions, radiation treatment, surgery and medication for the treatment of an abdominal tumor.

The Court finds that Nancy Milton is an adult and does have a large abdominal tumor. The Court further finds the medical prognosis indicates she will die soon if the tumor is not treated or surgically removed. The Court further finds that Nancy Milton is more than fifty years old, but has a reasonably long life expectancy if treated successfully. Nancy Milton is under the delusion that she is married to Reverend Leroy Jenkins and that someday

he will come and treat her and perform a miracle and she will again be well. This delusion has persisted over a period of months and no treatment is in progress and she does not claim to be under treatment by spiritual means in accordance with a recognized religious method of healing at the current time. Nancy Milton has the mental capability of understanding the nature of her current illness and understanding the nature of the treatment contemplated, and she further understands clearly the adverse side effects of some of the treatment contemplated. If her refusal for surgery was based solely on the adverse side effects, this Court would have to refuse the request to forcibly treat her. However, the testimony before the Court is that a refusal of treatment is not based on the adverse side effects but based solely on the delusion that Jenkins will come and treat her. If Nancy Milton was currently under treatment spiritually by Jenkins, the Court would also have to find that the State could not forcibly treat her, even if Jenkins' spiritual treatment were unsuccessful.

The Court therefore finds by clear and convincing evidence that Nancy Milton is under a delusion as to the treatment to be received from Jenkins. The Court further finds by clear and convincing evidence that Nancy Milton does not have the mental capability to consent to her own surgery because of the delusion and that surgery or other medical procedures should be performed in the treatment of the cancerous tumor.

Counsel for respondent raises a further question as to whether or not the statute which allows for judicially imposed surgery would include intervention of treatments which do not actually involve cutting, or at least the actual cutting of the skin, as for instance, in certain types of "surgery", a laser beam is employed. Although it maybe

doesn't actually cut the skin, but it accomplishes the same thing as other types of surgery. The Legislature in no way could contemplate medical advances that would have been accomplished without the actual cutting of skin. Therefore, the word "surgery" in the statute would certainly include not only the treatment necessary to avoid infection, or blood transfusions to avoid bleeding to death, but would include medical advances and techniques that could be used to avoid the actual physical opening of the body. This Court would include in that range of treatments radiation.

This Court therefore finds that treatment should be commenced which will eliminate, shrink or render harmless the cancerous tumor contained in the body of Nancy Milton. An Entry may be prepared in conformity with this opinion, however such Entry shall postpone the day of surgery until time has expired for appeal from this judgment.

/s/ RICHARD B. METCALF
RICHARD B. METCALF
Judge of the Probate Court

APPEARANCES:

ANTHONY J. CELEBREZZE
Attorney General, State of Ohio

By J. MICHAEL EVANS
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RONALD L. SMITH
Ohio Legal Rights Service
8 E. Long Street
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Attorney for Respondent

APPENDIX D

Referee's Findings

(Dated January 15, 1986)

Case No. M-5303

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
PROBATE DIVISION

IN THE MATTER OF
NANCY MILTON
Alleged Mentally (Ill)

HEARING ON CONTESTED MATTERS

Nature of Hearing: Mentally (Ill)

Attorney for Respondent: WILLIAM J. BROWNING

Attorney for Hospital:

Other Parties: ARMSTRONG & OKEY - Court Reporters
DR. EUGENE GREEN - Medical Expert
DR. - Court Doctor

DISPOSITION

The Court hereby finds that the surgical procedure as applied for is necessary.

The Court hereby authorizes the same to be performed.

/s/ WILLIAM F. DUCKWORTH

APPENDIX E

Judgment of the Supreme Court of Ohio

(February 20, 1987)

Case No. 86-1218

THE SUPREME COURT OF OHIO
COLUMBUS
1987 TERM

IN RE NANCY MILTON

APPEAL FROM THE COURT OF APPEALS

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the Probate Court's determination was erroneous and the judgment of the Court of Appeals upholding it is reversed consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Probate Court to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Franklin County for entry.

/s/ THOMAS J. MOYER
Chief Justice

I, ROBERT L. EDINGTON, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date .....

ROBERT L. EDINGTON *Acting Clerk*
/s/ J. A. REDD *Deputy*

APPENDIX F

Ohio Revised Code §5122.271

5122.271 Consent of patient or his guardian required for certain treatment; other conditions of treatment; procedure in medical emergency

(A) Except as provided in divisions (C), (D), (E), and (F) of this section, the chief medical officer or, in a nonpublic hospital, the attending physician responsible for a patient's care shall provide all information, including expected physical and medical consequences, necessary to enable any patient of a hospital for the mentally ill to give a fully informed, intelligent, and knowing consent, the opportunity to consult with independent specialists and counsel, and the right to refuse consent for any of the following:

(1) Surgery;

(2) Convulsive therapy;

(3) Major aversive interventions;

(4) Sterilizations;

(5) Any unusually hazardous treatment procedures;

(6) Psycho-surgery.

(B) No patient shall be subjected to any of the procedures listed in divisions (A) (4) to (6) of this section until both his informed, intelligent, and knowing consent and the approval of the court have been obtained, except that court approval is not required for a legally competent and voluntary patient in a nonpublic hospital.

(C) If a patient is physically or mentally unable to receive the information required for surgery under division

(A)(1) of this section, or has been adjudicated incompetent, the information may be provided to the patient's natural or court-appointed guardian, who may give an informed, intelligent, and knowing written consent.

If patient is physically or mentally unable to receive the information required for surgery under division (A)(1) of this section and has no guardian, then the information, the recommendation of the chief medical officer, and the concurring judgment of a licensed physician who is not a full-time employee of the state may be provided to the court in the county in which the hospital is located, which may approve the surgery. Before approving the surgery, the court shall notify the legal rights service created by section 5123.60 of the Revised Code, and shall notify the patient of his rights to consult with counsel, to have counsel appointed by the court if he is indigent, and to contest the recommendation of the chief medical officer.

(D) If, in a medical emergency, it is the judgment of one licensed physician that delay in obtaining surgery would create a grave danger to the health of the patient, it may be administered without the consent of the patient or his guardian if the necessary information is provided to the patient's spouse or next of kin to enable that person to give informed, intelligent, and knowing written consent. If no spouse or next of kin can reasonably be contacted, or if the spouse or next of kin is contacted, but refuses to consent, then the surgery may be performed upon the written authorization of the chief medical officer or, in a nonpublic hospital, upon the written authorization of the attending physician responsible for the patient's care, and after the approval of the court has been obtained. However, if delay in obtaining court approval would create a grave danger to the life of the patient, the chief medical officer or, in a nonpublic hospital, the attending physician

responsible for the patient's care may authorize surgery, in writing, without court approval. If the surgery is authorized without court approval, the chief medical officer or the attending physician who made the authorization and the physician who performed the surgery shall each execute an affidavit describing the circumstances constituting the emergency and warranting the surgery and the circumstances warranting their not obtaining prior court approval. The affidavit shall be filed with the court with which the request for prior approval would have been filed within five court days after the surgery, and a copy of the affidavit shall be placed in the patient's file and be given to the guardian, spouse, or next of kin of the patient, to the hospital at which the surgery was performed, and to the legal rights service created by section 5123.60 of the Revised Code.

(E)(1) If it is the judgment of two licensed physicians, as described in division (E)(2) of this section, that a medical emergency exists and delay in obtaining convulsive therapy creates a grave danger to the life of the patient, convulsive therapy may be administered without the consent of the patient if the patient is physically or mentally unable to receive the information required for convulsive therapy and if the necessary information is provided to the patient's natural or court-appointed guardian, spouse, or next of kin to enable that person to give informed, intelligent, and knowing written consent. If neither the patient's guardian, spouse, nor next of kin can be contacted through exercise of reasonable diligence, or if the guardian, spouse, or next of kin is contacted, but refuses to consent, then the convulsive therapy may be performed upon the written authorization of the chief medical officer or, in a nonpublic hospital, upon the written authorization of the attending physician responsible

for the patient's care, and after the approval of the court has been obtained.

(2) The two licensed physicians referred to in division (E)(1) of this section shall not be associated with each other in the practice of medicine or surgery by means of a partnership or corporate arrangement, other business arrangement, or employment. At least one of the physicians shall be a psychiatrist as defined in division (E) of section 5122.01 of the Revised Code.

(F) Major aversive interventions shall not be used unless a patient continues to engage in behavior destructive to himself or others after other forms of therapy have been attempted. Major aversive interventions may be applied if approved by the behavior modification committee appointed by the director of mental health under section 5119.01 of the Revised Code. The director of the legal rights service created by section 5123.60 of the Revised Code shall be notified of any proposed major aversive intervention prior to review by the behavior modification committee. Major aversive interventions shall not be applied to a voluntary patient without the informed, intelligent, and knowing written consent of the patient or his guardian.

(G)(1) Unless there is substantial risk of physical harm to himself or others, or other than under division (D) or (E) of this section, this chapter does not authorize any form of compulsory medical, psychological, or psychiatric treatment of any patient who is being treated by spiritual means through prayer alone in accordance with a recognized religious method of healing without specific court authorization.

(2) For purposes of this section, "convulsive therapy" does not include defibrillation.

APPENDIX G

Excerpt from Hearing Before the Probate Court

(February 12, 1986)

No. M-5303

IN THE
PROBATE COURT OF FRANKLIN COUNTY, OHIO

In the Matter of
NANCY MILTON

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

MR. MICHAEL EVANS,
On behalf of Central Ohio Psychiatric Hospital.

MR. RONALD L. SMITH,
On behalf of the Ohio Legal Rights Service.

BE IT REMEMBERED that on the trial of the above entitled cause at the January term, 1986, of the Probate Court of Franklin County, Ohio, before Honorable Richard B. Metcalf, Judge, the Executor, to maintain the issues on its part to be maintained, offered and introduced in testimony on its behalf the following evidence, to-wit:

* * * * *

[4] Mr. Evans: Could we stipulate Dr. Lindner's qualifications and he's the Chief Medical Officer?

Mr. Smith: Yes, so stipulated.

Q. Doctor, have you had an opportunity to examine Nancy Milton and to review her hospital records? A. Yes, I have.

Q. And when did you examine her? A. I examined her in November and again I examined her this morning.

Q. Have you also consulted with other doctors about her physical condition? A. Yes, sir, I have.

Q. Based on your training and experience, you examinations of her, your consultation with other doctors and your review of her records, first, do you have an opinion to a reasonable degree of medical certainty concerning her mental condition? A. Yes, sir, I do.

Q. Would you just briefly state what her mental condition is to the Judge. A. Ms. Milton suffers from a very fixed set of delusions that would constitute a psychosis. She is absolutely convinced that she is the wife of the evangelist, Leroy Jenkins, and the history that we have indicates that this delusional system has been present for a period of at [5] least eight years as a result of which she has not been employed, has not discharged the ordinary responsibilities of other persons, has traveled about parts of the country pursuing and allegedly harassing Mr. Jenkins and his family.

At the time she was committed to the Central Ohio Psychiatric Hospital in November of 1984 she had been in the Delaware area because of the office of the Jenkins Organization that is in the Delaware area, at first living off of the charity of religious persons in that area, and then when she was rejected by them, she was living in the open fields, was eventually detained by the police and referred to the hospital.

* * * * *

[24] Q. [By Mr. Evans] * * * I didn't say that very well but you understand what I mean. Doctor, did you discuss with Ms. or Mrs. Milton her refusal to accept the course of treatment? A. [By Dr. Eugene Green] Yes. She made it very clear every time I got near the subject that she was a faith healer, didn't believe in other methods of treatment, that God would take care of it. She herself has been a faith healer and has brought back sight to blind people. She said her husband, meaning Leroy, drilled a hole behind the church up in Delaware and this is like a miniature well and out of it comes water and this is holy water and that along with her capacity for gift of curing, she's gifted and cured many people but Leroy is the big specialist in curing sick people.

Q. In the course of your examination did you examine her to determine her mental condition as this time? A. Yes.

Q. Did you arrive at a diagnosis? A. Yes. She has very vivid delusions that she is blessed with certain talents

from God and that she is indeed Mrs. Leroy Jenkins. The two of them together are faith [25] healers.

Q. That's in your opinion a delusion of hers? A. Very fixed and every time I would get near more questions concerning the system, she would back off and say "Well, I can answer some of your questions but I cannot answer questions dealing with the fact that I am Mrs. Jenkins or that I have special powers. I can't talk about those." She said "After I get out of here and am well, you come up to see me and I'll tell you all about it."

I asked her about Leroy being in jail and she said "Well, that happens to many people who are blessed by God. That they end up being scoured by nonbelievers." I asked her about how long she had been married to Leroy. She said "I can't answer that," and I got that stock answer on many many questions dealing with the delusion system.

* * * * *

[28] * * * Q. If I were to ask a simple question: Why do you think she's refusing the surgery, how would you answer? A. I think that it conflicts with her basic beliefs that faith healing is the prime thing in life and it would be almost a sin to try anything else.

Q. But that part of her makeup is the crux of her mental illness, is it not? The whole system of beliefs about Leroy Jenkins and the business about faith healing and so on and so forth, isn't that the core of her delusional system? A. This is her phychosis, yes.

* * * * *

APPENDIX H

Entry of the Probate Court Authorizing Surgery

(Filed January 15, 1986)

Case No. M-5303

IN THE
PROBATE COURT OF FRANKLIN COUNTY, OHIO

In the Matter of
NANCY MILTON

ENTRY AUTHORIZING SURGERY

For good cause shown and upon application of Dr. Lewis Lindner Chief Medical Officer of Central Ohio Psychiatric Hospital requesting the Probate Court to approve surgery to authorize transfusions as needed, along with 20 radiation treatments and then possible surgery on Nancy Milton the Court hereby finds:

1. Nancy Milton is unable to receive the information required to enable him [sic] to give a fully informed intelligent and knowing consent;

2. that Dr. Lewis Lindner, Dr. B. Yakhimi and Dr. Eugene Green have recommended to the Court that the above described surgery take place;

3. that the Court has notified the Legal Rights Service of the Application to Authorize Surgery;

4. .....

.....

.....

Upon examination of all evidence the Court hereby finds that the surgical procedure as applied for is necessary. The Court hereby authorizes the same to be performed.

/s/ RICHARD B. METCALF
Probate Judge